LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 3 1965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965

NO. 798

BERNARD E. KING,
PETITIONER

v.

UNITED STATES OF AMERICA

PETTTION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ORIE SELTZER
1415 K Street, N.W.
Washington, D. C.

THEODORE E. BREAULT
1415 K Street, N.W.
Washington, D. C.

TABLE OF CONTENTS

	Page
Citations to Opinions Below	2
Jurisdiction	2
Statement of Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Statement of the Facts	5
Reasons for Granting the Writ	15
Conclusion	27

TABLE OF CASES

Agnello v. United States, 269 U.S. 20, 70 L.ed. 145, 46 S.Ct. 4, 51 A.L.R. 409 (1925)	18
Morandy v. United States, (1948, CA 9th Cal.) 170 F.2d 5, cert. den. 336 U.S. 938, 93 L.ed. 1097, 69 S.Ct. 741	15
Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.ed. 2d 777 (1964)	17, 18, 19, 20
United States v. Russo, 123 F.2d 420, CCA 3, 1941	16
United States v. Ross, 92 U.S. 281	16
Weeks v. United States, 232 U.S. 383, 58 L.ed. 652, 34 S.Ct. 341, L.R.A. 1915 B 834 (1914)	18

TABLE OF STATUTES

Title 22, District of Columbia Code, Sec. 1801	3
Title 22, District of Columbia Code, Sec. 2201	3

In the
Supreme Court of the United States

OCTOBER TERM, 1965

NO.

BERNARD E. KING,
PETITIONER,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Bernard E. King, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled matter on May 25, 1965.

CITATIONS TO OPINION BELOW

The Court of Appeals for the District of Columbia Circuit rendered no opinion. It affirmed the holding of the trial court by a per curiam judgment. Rehearing was denied without opinion on October 5, 1965.

JURISDICTION

The judgment of the court below was entered on May 25, 1965, and the judgment denying rehearing was entered on October 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Was there sufficient evidence to support a judgment of conviction of housebreaking as to the petitioner, Bernard E. King?

2. Was there sufficient evidence to support a judgment of conviction of larceny as to the petitioner, Bernard E. King?

3. Did the trial court err in allowing the Government to put on testimony with regard to what police officers saw in a vehicle after the Government consented to the suppression of all evidence found in the vehicle?

4. Did the trial court err in not striking from the record all testimony as to objects found in a vehicle when the Government consented to their suppression?

5. Did the Court err in admitting into evidence over defense counsel's objection certain exhibits which could have come from a suppressed source?

6. Did the Court err in admitting into evidence over defense counsel's objection certain exhibits that were inadequately and never directly identified?

7. Did the Court err in instructing the jury that they may apply the inference of the possession of recently stolen property to the petitioner as to items contained in a vehicle in which he was a mere passenger?

8. Did the Court err in instructing the jury that they may apply the inference of the possession of recently stolen property to the petitioner as to items physically on the person and in the actual possession of petitioner's companion?

STATUTES INVOLVED

Title 22, District of Columbia Code, Sec. 1801. *Definition and penalty. Housebreaking.*

Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years. (Mar. 3, 1901, 31 Stat. 1323, ch. 854, Sec. 823.)

Title 22, District of Columbia Code, Sec. 2201. *Grand larceny.*

Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years. (Mar. 3, 1901, 31 Stat. 1324, ch. 854. Sec. 826; Aug. 12, 1937, 50 Stat. 628, ch. 599; June 29, 1953, 67 Stat. 99, ch. 159, Sec. 215(a)).

STATEMENT OF THE CASE

On May 18, 1964, an indictment in two counts was returned against the petitioner in the United States District Court for the District of Columbia.

Count One of this indictment alleged that the petitioner had entered the store of Harry M. Rayman on or about February 3, 1964, in the District of Columbia, accompanied by William E. Ringgold, with the intent of stealing the property of another in violation of Title 22, Section 1801 of the District of Columbia Code.

Count Two of the indictment charged petitioner with stealing the property of Harry M. Rayman, of the value of about $3,800.35, consisting of the following: $3,000.00 in money, one money chest, of the value of $200.00, a quantity of narcotics, of the value of $300.00, and one key, of the value of $0.35 in violation of Title 22, Section 2201 of the District of Columbia Code on or about February 3, 1964.

The petitioner pleaded not guilty to each count of the indictment when arraigned on May 22, 1964, and subsequently on June 22, 1964, the defendant filed a motion for the suppression of certain evidence and for the return of seized property along with prayers for other appropriate relief. The motion to suppress was heard and denied on September 1, 1964, except as to those items seized in the search of the automobile, upon which no ruling was made, for lack of competent evidence.

Petitioner was tried by a jury beginning September 1, 1964, and convicted on all counts on September 3, 1964.

On September 10, 1964, a motion for judgment of acquittal or for a new trial was filed in behalf of the petitioner; it was argued on September 18, 1964, and a decision thereon taken under advisement. The motion was denied on September 24, 1964, by memorandum.

Thereafter on October 9, 1964, the petitioner was sentenced and committed.

Judgments of conviction and commitment on both counts of the two-count indictment were entered on October 12, 1964.

STATEMENT OF THE FACTS

On February 3, 1964, at approximately 8:15 a.m., Leonard Louis Winkleman, an employee of the Park Rexall Drug Store, located in the District of Columbia, opened the store to begin the business day (R-121-8) only to find the safe broken open and some of its contents strewn on the floor (R-121-2). The items listed as missing were: narcotics, barbiturates, amphetamines, coins, currency, receipts, checks and several boxes of rings. The Metropolitan Police Department for the District of Columbia was then called and an investigation and search was made of the premises by officers of No. 11 Precinct (R-130).

Several hours previous to the discovery of the demolished safe on the drug store premises, at approximately 2:30 a.m., the petitioner, Bernard E. King, was riding with a companion, one William E. Ringgold, in an automobile borrowed from one, Carlos Santos, (R-203-5) in the State of Maryland at which time they were stopped for a traffic violation (R-5 to 9, 26 and 27, 40, 81).

During the hearing of the Petitioner's Motion to Suppress, on direct examination, Officer Paul A. Welch of the Prince George's County Police Department testified that he was cruising in his scout car (R-37) in the vicinity of Hall, Maryland, approximately twenty (20) miles from the District of Columbia when he observed the 1955 Oldsmobile in which the petitioner was riding. In answer to the question:

> Q. Was there anything unusual about that particular car?

He stated:

> A. Nothing other than a look-out had been posted for that year and make of car. (R-38)

The following colloquy between the Assistant United States Attorney and Officer Welch during the hearing of petitioner's Motion to Suppress (R-38 line 15 to 40 line 21) sets out the details of the events immediately thereafter:

Q. All right. Now, when you saw this car, what did you do?

A. I took the tag number and told the dispatcher that I had found – that I was behind an automobile of the make which they were looking for in Marlow Heights but he said he didn't have the tag number and didn't know, so I let the car go. I didn't stop it.

Q. Then what happened after that?

A. A short distance down the road, I turned off on old Maryland Route 214. This particular road that we were on at the time I was first behind this car, it was a dual lane highway. It was put in to by-pass a little village more or less, two stores and a lumber yard there which is the old Hall and the old Central Avenue. When I dropped this car, I went off to the right and went down on old Central Avenue.

Q. Did there come a time when you again fell in behind this car?

A. Yes, sir. This particular road comes back onto Central Avenue and meets 214 approximately a quarter of a mile from there.

Q. Now, when you fell in behind the car again, did you notice anything unusual at this time?

A. Yes, sir. This car, at the time I got to the rear of it, started weaving over the center line.

Q. How long did it continue to do that?

A. Approximately a mile, a mile and a half.

Q. Did you continue to follow the car?

A. Yes, sir, I did.

Q. All right, will you tell us how long you followed the car?

A. I followed the car until it turned right. It turned off of Central onto Queen Anne Road.

Q. After the car turned onto Queen Anne Road, did there come a time when you stopped that car?

A. Yes, sir. Approximately a block or a block and a half off of Central Avenue, I turned on my red light and my spotlight and stopped the car.

Q. Would you tell us what took place after you stopped the car?

A. Well, as I approached the rear of the car, I had in my hand my hand light that we carry in the car. There was no illumination at all, no street lights, so I was putting the light through the rear window, at which time I saw a passenger sitting in the right front of the car take from his wallet a driver's license and give it to the operator of the car.

Q. Now, did you get a look at the two people in the car?

A. Only from the rear. I didn't see their faces.

Q. Then after you saw this transaction, what next did you see?

A. I asked the operator of the vehicle to let me have his driver's license and registration. I told him what he was doing and why I stopped him, and that I would like to see his driver's license and registration.

Additional testimony by Officer Welch on direct examination during the trial of this matter brought out the observation made by the officer of a metal box ". . . made out of steel which appeared to be heavy steel, approximately 18 inches long and approximately 12 inches wide." (R-84). The box was partially covered on the rear floorboard. (R-43). On the front floorboard the officer noticed, ". . . a door which looked to be that of a safe," (R-85, 43) whereupon the occupants of the vehicle were ordered out and instructed to place their hands on top of the vehicle (R-43).

A resultant search revealed the following listed items to have been found on the person of the petitioner or his associate, Mr. Ringgold, immediately upon the arrest or in the raincoat taken from the vehicle and worn by Mr. Ringgold subsequent to the first search:

From the petitioner: (R-96, 44, 47, 104)

A. $1,015.00
Government's exhibit No. 6.

From William E. Ringgold: (R-44, 85)

A. $885.00
Government's exhibit No. 4.

B. Two gold rings.
One silver ring.
Government's exhibit No. 1.

C. One metal hinge.
Government's exhibit No. 3.

D. One pair of brown socks.
Government's exhibit No. 5.

E. One key, Aue 61.
Government's exhibit No. 2.

On cross-examination, Officer Welch was unable to state which exhibits of the Government were found either on Mr. Ringgold or in the raincoat which he subsequently took from the vehicle (R-56, 91-92). After the defense had rested its case and just prior to the argument in support of the motion to suppress (R-56), a colloquy between the Court and prosecution witness, Officer Welch, manifested the lack of knowledge or awareness shown by said witness throughout the hearing of petitioner's Motion and the subsequent trial as to exactly where the exhibits were found:

> THE COURT: Mr. Witness, what clothing was William E. Ringgold wearing when you searched him?
>
> THE WITNESS: Sir, I think he had on a white shirt, long-sleeved shirt and dark-colored trousers.
>
> THE COURT: Was he wearing a raincoat?
>
> THE WITNESS: No, sir, not at the time. He didn't have it on at this time but there was a raincoat in the car.

THE COURT: Where did you find the rings and the money, in what part of his clothing?

THE WITNESS: I believe in all pockets. I believe all pockets had some — either money or rings or a hinge.

A similar colloquy was had at the time of the trial of the petitioner (R-91 to 92):

Q. Did you get any of the items that were identified as Government's Exhibits 1 through 5 from his shirt or his trousers?

A. Yes, sir, I did.

Q. What items?

A. I don't recall, sir.

Q. Did you search a raincoat?

A. Yes, sir, I did.

Q. Did you get any items from the raincoat?

A. Yes, sir, I did.

Q. What items?

A. I didn't take note of what I was taking from what pockets, sir.

Q. Now, before — A few moments ago, I asked you a question as to what he was wearing and you said a shirt and trousers.

A. Yes, sir.

Q. Was he wearing, at that time, a raincoat?

A. No, sir.

Q. When did he get the raincoat?

A. That is when I put him back in the police car.

Q. Where did the raincoat come from?

A. Out of the car he was driving.

Q. And you don't recall what items were taken from the raincoat?

A. No, sir, I don't.

All testimony by witnesses for the prosecution was negative as to the source of the Government's exhibits. The only affirmative testimony was that of the petitioner and his companion, Mr. Ringgold, who stated (R-14) during the motion to suppress:

> A. Then, they — the officer searched me and I had this raincoat on because it just started sprinkling before we left. He got some things out of the pocket of the raincoat. He asked me about them. I said, "I don't know anything about it. The raincoat was in the car with the rest of the clothes and I put it on because I was cold."

(R-23 to 24)

> Q. In any event, after this second officer came, Officer Welch searched your person?
> A. No.
>
> Q. You were never searched?
> A. I was searched but it wasn't then.
>
> Q. When were you searched?
> A. I was searched after everybody was there and left. We was on the way back to the police station.
>
> Q. The officer searched you and found quite a bit of money, didn't he?
> A. I believe there was a few hundred.
>
> Q. Eleven hundred.
> A. No. He found eight hundred and eight-five dollars.
>
> Q. Eight hundred and eighty-five dollars?
> A. That is right.
>
> Q. This is about 2:30 in the morning, is that correct?
> A. That is correct.

Q. And he also found on your person some rings, didn't he?

A. I believe he found some pearl rings.

Q. Pearl ladies' rings, isn't that correct?

A. That is correct.

Q. And also a key?

A. Yes.

Q. Where did you get these items from?

A. They were in that raincoat pocket that I put on.

Q. Was this your raincoat?

A. No, it wasn't.

Q. How about the money, was that also in the raincoat pocket?

A. No, that was in my pocket.

and later, during the trial on the direct examination of Mr. Ringgold, it was stated (R-208, 209):

Q. Did there come a time when he searched you?

A. Yes, sir.

Q. Do you know what he took from your pockets?

A. He took $885 out of my pockets.

Q. What were you wearing when you were searched?

A. I had a shirt on and a pair of slacks.

Q. Did you have anything else in your pockets?

A. I had my medicine bottle with a prescription on it and, I think, I had — I bought it in a drug store — it's a tube of butch was, hair preparation. I had that in my pocket and I had some cards in a little card case I carry, my identification cards. I think that is about it, a comb.

Q. Did there come a time when you had in your possession or in your hands a raincoat?

A. The raincoat was in the car, yes.

Q. Well, did it ever get into your hands physically?

A. Yes. It turned chilly and it started to rain a little bit and I seen this coat there and I asked the officer if I could get this coat and that's when he got the coat out of the car.

Q. This is after you had been apprehended?

A. I was standing outside the car.

Q. And then you took the coat out of the automobile?

A. Yes, sir.

Q. Did the policeman then search the coat?

A. He searched the coat, yes, sir.

Q. Do you know what he took out of the coat?

A. He took, I think it was a pair of socks and some miscellaneous stuff. I think he said, "This is a hinge." And he asked me about it. I said, "I don't know anything about it. The clothes in the car and all don't belong to me."

Q. Was that your raincoat?

A. No, sir.

Q. Had you ever seen it before that night?

A. No, sir.

Q. Do you own a raincoat?

A. No, I don't, sir.

(R-222, 224)

Q. Now, you also had some other items on you, didn't you, such as some rings and a key; is that correct?

A. They weren't on me, no.

Q. Well, then, the officer is incorrect when he says he got it from your person?

A. He certainly is.

Q. You have no idea where the rings and the key and the hinge came from?

A. He got them out of the raincoat pocket in the car.

Q. By the way, do you have the raincoat here today?

A. No, I don't. I told the officer about it when I was arrested and he was trying to find out who belonged to the raincoat. He said was it mine? I said, "It's not my raincoat."

Q. You didn't seek to have the raincoat brought here today?

A. No, I didn't.

Q. By the way, there was a metal box in the back seat on the floor, wasn't there?

A. Yes.

Q. Where did that come from?

A. Like I told the officer, I don't know.

Q. You just got into this borrowed car and never bothered looking around at all, did you?

A. Well, I don't see how anybody —

THE COURT: Just answer the question.

THE WITNESS: No, I didn't bother to look through his things.

BY MR. COLLINS:

Q. You didn't notice a part of a box on the floor under King's feet either, did you?

A. There was nothing on there I don't believe. I do know what was up front.

Q. You say this raincoat was in the car when you got in?

A. That is correct.

Q. But you didn't look in that coat either, did you?

A. No, I didn't

Q. So that you don't know where any of the property came from that was taken from the coat?

A. No. Just like I told the police officer, why didn't he ask the man who owns the car who it belongs to.

Whereas the cause of the initial arrest of the petitioner and Mr. Ringgold was the weaving motion of the automobile, (R-47, 53) the charges actually placed against the pair was the displaying of an operator's license not his own as to Mr. Ringgold and loaning his operator's license as to Mr. King. (R-44) The aforesaid charges stemmed from the observation by the arresting officer of the exchanging of driver's license in the vehicle occupied by the petitioner (R-40) as he approached said vehicle from the rear using a hand light as the sole illumination of the area. At this point when the officer stated he saw the exchange of operator's permits he also noticed the above described steel box and after some questioning of the occupants of the vehicle, they both were ordered out and told to place their hands on top of the automobile. (R-43) Officer Welch then requested the police dispatcher to send assistance at which time Officer William A. O'Neil responded (R-43, 95, 98). Officer Welch then searched Mr. Ringgold and Officer O'Neil searched Mr. King (R-44, 96 to 98). A large sum of money was recovered from the right pants pocket of Mr. King. (R-97) [Government's exhibit No. 6.] A short time later Detective Christopher O. Bryan arrived at the scene and the petitioner was put into his custody to be transported to the Detective Bureau at Seat Pleasant, Maryland (R-45, 101).

REASONS FOR GRANTING THE WRIT

I. Was there sufficient evidence to support a judgment of conviction of housbreaking as to the petitioner, Bernard E. King?

In the housebreaking count of the indictment, the petitioner, Bernard E. King, was charged with entering the store of one, Harry M. Rayman, on or about February 3, 1964, within the District of Columbia, with the intent to steal property belonging to another. There was in support of this count no testimony presented in behalf of the prosecution which places the petitioner at the scene of the crime or in the vicinity at or around the time of the breaking and entering of Mr. Rayman's establishment. To the contrary, all testimony illicited from the owner of the store and his employees centered around the description of the premises involved and a description of its contents with no reference whatsoever as to the whereabouts of the petitioner or his companion on the evening of February 2 and the early morning of February 3, 1965.

The only way the Government could link the petitioner to the crime was through the doctrine of the possession of recently stolen property:

> *Morandy v. United States* (CA 9th Cal) 170 F. 2d 5, cert. den. 336 U. S. 938, 93 L. ed. 1097, 69 S. Ct. 741 (1948).

since all the evidence as to the petitioner was highly circumstantial. The trial court admitted (R-109) having some difficulty with establishing the contents of the safe prior to the drug store being closed on February 2, 1965, and with the attempt of the prosecution witnesses in describing the items involved prior to their introduction into evidence (R-117). The only items on which there was any direct testimony was a key [Government's exhibit No. 2] and a hinge [Government's exhibit No. 3] which were both re-

covered from the person of the petitioner's companion, William E. Ringgold. The only item taken from the possession of the petitioner was the sum of $1,015.00 [Government's exhibit No. 6]. The Government failed to make a prima facie case on which it was entitled to go to the jury since the sum of money in the possession of the petitioner could not be identified and was not linked to the commission of the crime.

When the jury received the case the Government urged the theory of "possession." The only thing the petitioner possessed was the above described sum of money which was never linked to the crime. Therefore, the theory espoused by the Government was completely inaccurate and substantial error was committed by the trial judge as to the petitioner.

In summary, the Government's case is based solely on circumstantial evidence insofar as petitioner is concerned. In order to justify a conviction of a crime on circumstantial evidence, it is required that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt. *United States v. Russo,* 123 F.2d 420, CCA 3, 1941. No such directly proven circumstances are present here. *United States v. Ross,* 92 U.S. 281.

II. Was there sufficient evidence to support a judgment of larceny as to the petitioner, Bernard E. King?

Count two of the indictment charges the petitioner with stealing: $3,000.00 in money, a money chest, some narcotics, and a key. The sum of $1,015.00 [Government's exhibit No. 6] was found on the person of the petitioner, not $3,000.00. A money chest was never introduced into evidence and narcotics were never found on the petitioner or his companion. The only item listed in the indictment which was admitted into evidence was a key [Government's exhibit No. 2] identified by the Government's witness, Harry M.

Rayman. This key was recovered from the possession of the petitioner's companion, William E. Ringgold.

As set out above in *I*, the evidence as to the petitioner was wholly circumstantial and tenuous at best causing the Government to bolster its case by the use of the theory of possession of recently stolen property.

Count two standing in the same position to the petitioner as count one, the same principles, therefore, which apply to the former also apply to the latter. The above-mentioned key being in the sole and exclusive possession of the petitioner's companion, the possession thereof could not be imputed to be in the possession of the petitioner on the theory of the possession of recently stolen property or by way of any constructive possession theory. As was also argued in *I*, the "possession" theory cannot create possession where there is none.

In summation, there was no prima facie case to go to the jury as to the petitioner, and, once to the jury, possession could not be found in the petitioner when it was actually and physically in someone else.

III. Did the trial court err in allowing the Government to put on testimony with regard to what police officers saw in a vehicle after the Government consented to the suppression of all evidence found in the vehicle?

At the request of the trial judge, the prosecution reviewed the case of *Preston v. United States*, 376 U.S. 364, 84 S. Ct. 881, 11 L. ed. 2d 777 and stated (R-68):

> In view of the *Preston* case, the Government at this time will consent to the suppression of the box that was found in the car.
>
> However, the Government would want to be able to put on testimony or all of the testimony as to what

> the officer saw in the car. In other words, we will not offer the box in evidence but we would want to be able to put on the officer's testimony as to what he saw in the car without actually having searched the car. Other than that, we would consent to the motion by counsel to the suppression as to the items found in the car.

In conceding the applicability of *Preston* to the vehicle occupied by the petitioner and his companion, the Government conceded that the search of the vehicle was not *incident* to the arrest of the occupants on the motor vehicle violations. There being no "fruits" of such a violation, and not being a crime in the usual sense, there was no search necessary or lawful incident to the traffic regulation infraction. Since there was no opposition in behalf of the petitioner or his companion to the arrest being made by Officer Welch, he therefore had no reason to search for firearms or weapons. In spite of this, however, he arrested both occupants and searched their persons after they were ordered from the vehicle (R-43).

Weeks v. United States, 232 U.S. 383, 58 L. ed. 652, 34 S. Ct. 341, A.L.R. 1915B 834 (1914).

Agnello v. United States, 269 U.S. 20, 70 L. ed. 145, 46 S. Ct. 4, 51 A.L.R. 409 (1925).

The safe door and the steel box observed in the vehicle at the time of the arrest (R-84, 85) were only items creating a suspicion in the mind of the arresting officer as to a possible crime committed prior to this arrest. No crime was in fact known by the arresting officer to have occurred prior to the arrest (R-38). Not having known that a crime had been committed, the discovery of the suspicious items does not give reasonable or probable cause to the investigating officer to arrest the suspicious persons and look around for a crime with which to link the persons or the items in their possession or immediate environment. In the criminal law

involving arrest with a search and seizure of property incident thereto, a doctrine of "relation back" has not yet developed or been declared by the Supreme Court to be in existence. The knowledge of a crime must come first and the seizure of the "fruits" subsequent thereto. An officer cannot lawfully seize "fruits" of a crime and then look for the criminal act and then relate the seized property back to the crime upon its discovery. The lawfulness of a search is judged by how it is initiated and conducted and not by what it reveals.

The arrest being for a traffic violation (R-43), the subsequent search also must be judged thereby. Since such a violation involves no "fruits" the arresting officer could not lawfully search for any; no resistance being given to the officer, there was no lawful reason to search for weapons or implements of resistance.

Since the Government recognized the application of *Preston* to any items recovered from the vehicle, the trial court was duty bound to exclude from the testimony of the prosecution's witnesses any references thereto. The Court below gave the Government the benefit of suppressed evidence without its being admitted into evidence. What the Court would not allow the Government to do directly, the Court allowed the Government to do indirectly.

IV. Did the trial court err in not striking from the record all testimony as to objects found in a vehicle when the Government consented to their suppression?

With the Government's recognition that *Preston* governed the articles found in the vehicle borrowed by the petitioner's companion, two allied questions evolved. The first question, answered in *III* herein, regarding the *admissibility* of testimony with respect to suppressed evidence and the second question, regarding the *striking* of testimony with regard to

suppressed evidence once it has become part of the record. The former deals with testimony prior to its becoming part of the record, and the latter, with testimony once it is a part of the record.

The second question, being the second prong of a two-prong question, must necessarily be answered the same since the reasoning involved stems from the same premise — if evidence is suppressed, it is so for all purposes and not so for some. What the right hand takes away the left cannot give. What is suppressed, is suppressed! Anything less gives the Government the benefit of the admissibility of the tainted evidence, which the law does not allow, and brings upon the defense the burden of disproving it, whom the law seeks to protect.

V. Did the Court err in admitting into evidence over defense counsel's objection certain exhibits which could have come from a suppressed source?

Prior to the first witness being sworn (R-68, 69), the Government consented to the motion by defense counsel to suppress all items found in the car. Its consent being based on *Preston v. United States*, supra. Following therefrom, two items which should then be suppressed are the raincoat worn by Mr. Ringgold which was taken from the vehicle and the steel box which was located in the rear of the vehicle. The Government consented to the suppression of the steel box but made no direct reference to the raincoat. The raincoat, however, was never identified as an exhibit or introduced into evidence. What logically flows from the Government's consent is that since the items found in the car are to be suppressed, then all articles found in these items should in turn be suppressed as coming within the purview of the suppression by consent.

The testimony of the investigating officers reveals that neither could state whether exhibits numbered 1, 2, 3, or 5

came from the pants pockets of Mr. Ringgold or from the raincoat worn by him when he was searched for the second time. (R-91) Therefore the possibility being great that the aforementioned exhibits came from the suppressed garment, the exhibits are tainted and the trial court should not have admitted them into evidence.

VI. Did the Court err in admitting into evidence over defense counsel's objection certain exhibits that were inadequately and never directly identified?

The record in the trial court is replete with testimony illicited from the Government's witnesses to the effect that they were to a great degree unable to identify the exhibits placed before them. Alternatives were used to describe the items such as "like" or "similar." Only two items were reasonably identified — the key and the hinge. [Government's exhibits No. 2 and No. 3] All evidence was highly circumstantial except for these two exhibits.

When questioned as to the key, Michael Kapson stated (R-118):

> A. (Perusing) No, I don't know this key. There is quite a few keys on the thing.

The other employee of the drug store, Leonard Louis Winkleman, was not even requested to identify the key. The only direct testimony with respect to the key which operated the drug store's money order machine was obtained from the store owner, Harry M. Rayman, who identified the key by number "AUE 61" (R-76). Not even at this time did the owner of the store state that the key recovered from the possession of Mr. Ringgold was the identical key stolen from his safe. Mr. Rayman's remarks were confined to his stating that "It is a duplicate key." (R-76) The prior statement is the only attempt at actual identification of the key.

As to the hinge which was also recovered from Mr. Ringgold, neither Mr. Kapson nor Mr. Winkleman identified it. Only Mr. Rayman attempted to do so:

> Q. I show you Government's Exhibit No. 3 and ask you if you saw this particular exhibit on February 3rd?
> A. I did.
>
> Q. Were you able to identify that exhibit?
> A. Yes.
>
> Q. What do you identify that exhibit as?
> A. That is off of the money chest, that is a hinge.
>
> Q. The money chest in your store?
> A. That is right. That was taken from the store.
>
> Q. I see.

With regard to the rings [Government's exhibit No. 1] Mr. Winkleman only stated that he checked the gift shop and noted that several boxes of rings were missing. (R-122) He was never asked to identify them, nor did he. Mr. Kapson, in turn, had no occasion to check the ring section before he left the store since it was not one of his duties and so testified (R-119). Mr. Rayman, the drug store owner, only stated when confronted by the rings for the purposes of identification (R-75) that he had at a time prior to the trial below ". . . identified the items as rings *similar* (emphasis supplied) to the ones that were missing from the store." On this basis alone, the rings were inadmissible as not having been properly identified and defense counsel's objections thereto (R-108, 132) as to vagueness of identification should have been sustained.

The two remaining exhibits, $1,015.00 recovered from petitioner [Government's exhibit No. 6] and $885.00 recovered from petitioner's companion, William E. Ringgold, [Government's exhibit No. 4] are not identifiable nor was

the currency ever linked to the contents of the safe prior to the drug store's closing on February 2, 1964. On direct examination at the trial below Mr. Rayman stated:

> Q. All right, sir. Now, at the time you left the store on Sunday, the 2nd, can you tell us what was in the safe?
>
> A. When I left the store, the safe contained narcotics, rolls of stamps, blank money orders, change and small bills to operate the store for the day.
>
> Q. How much money was contained in there?
>
> A. Oh, there would have been about a thousand.
>
> Q. A thousand dollars?

The approximation of the amount of currency in the safe at the time of closing is almost $1,000.00 less than the combined sums recovered from the defendants below. As defense counsel argues (R-138), no conclusions, presumptions, or inferences can be drawn with respect to the currency obtained from petitioner and his companion. Using this currency as evidence is circumstantial in the broadest sense and the trial judge's basis for allowing its admittance evades sound reasoning and is beyond the scope of any judicial discretion. Government's exhibits No. 4 and No. 6 being without the proper evidentiary foundation should have been excluded from the jury's consideration.

Mr. Winkleman being without ". . . personal knowledge of what was in the safe at the time it was closed on Sunday evening?" was able to make no identification of the exhibits (R-129) offered into evidence.

The trial court's admonition to the prosecution (R-117) as to describing the contents of the safe with more specificity especially as to the amount of money contained in the safe and the key [Government's exhibit No. 2] points out the problems seen by the Court below in the Government's proper identification of the exhibits through its witnesses.

In view of the foregoing the only exhibits identified with any certitude was the key to the money order machine, and the hinge [Government's exhibit No. 3], which were both found in the suppressed garment. The remaining exhibits [Government's exhibits No. 1, No. 4, No. 6] should have ruled inadmissible as identified inadequately, improperly and without reasonable certitude.

VII. Did the Court err in instructing the jury that they may apply the inference of the possession of recently stolen property to the petitioner as to items contained in a vehicle in which he was a mere passenger?

At the request of the Government (R-225), the trial court charged the jury (R-238, 239) as to the possession of recently stolen property. The court made no distinction as to possession by the petitioner or by his companion. Uncontroverted testimony shows that the petitioner was in possession of only $1,015.00. [Government's exhibit No. 6] (R-44, 96, 97, 104) The remainder of the exhibits submitted by the Government came into the possession of Mr. Ringgold subsequent to the first search and cannot be held to come within the theory of the possession of recently stolen property so as to apply also to the petitioner. This distinction as to *which* exhibits should be considered as being in *whose* possession was not made during the charge to the jury and thus made the instruction defective. The trial judge not having made this distinction, the jury cannot be deemed to have made this distinction for the judge.

The vehicle in which the two defendants below were riding was not owned by either. It was borrowed by Mr. Ringgold. Since neither was the owner of the vehicle, and since the vehicle was not borrowed on a general grant of authority (R-205) but for a limited purpose, the doctrine of the possession of recently stolen property does not apply to

the contents of the vehicle. The trial court made no distinction as to articles contained in the vehicle and articles recovered from the person of the petitioner or his companion. Since the trial court allowed into evidence statements of the arresting officers as to the contents of the vehicle in spite of the agreed suppression of the same, it logically flows that the jury also gave consideration to the contents of the vehicle pursuant to the Court's instruction on the possession of recently stolen property and thus was able to arrive at a guilty verdict. In this respect, the Government likewise obtained the benefit of suppressed evidence.

The aforementioned instruction, being silent as to the scope of its application and in its lack of distinction as to whom or to what it applied, must fall as being inadequate and defective.

VIII. Did the Court err in instructing the jury that they may apply the inference of the possession of recently stolen property to the petitioner as to items physically on the person and in the actual possession of the petitioner's companion?

The trial court's instruction as to "possession" was general and all inclusive. Lacking were distinctions as to its applicability to evidence found on the petitioner, on Mr. Ringgold, or found in the vehicle occupied by both. Also given was a general instruction as to the "exclusive" possession of recently stolen property. Neither charge explained physical possession as opposed to constructive possession.

At the conclusion of the Government's case (R-143), the Government urged upon the trial judge a theory of possession of recently stolen property mixed with a dose of conspiracy, although not so charged, in order to make a case against the petitioner, Bernard E. King:

> Now, we submit to Your Honor that the defendant King had joint possession of all of the property along with the defendant Ringgold even should the Court not feel that money alone was sufficient as to the possession by King. We submit that the evidence supports the theory that King was acting in concert with the defendant Ringgold and that the property in the possession of Ringgold as well as the property of King was jointly possessed by both defendants, in addition to which, the defendant King had possession or had his feet on this item resembling a safe.
>
> We submit, of course, that the possession here is recent, which is of great probative value, and we submit that the case has been proven against both defendants on the theory of possession of recently stolen property.

This charge sets out the theory of the Government's case as to petitioner, King, which when reviewed in light of the Court's instruction on "recent possession," points out the defect in the charge to the jury.

The Government argued to the Court that property possessed by Ringgold was also possessed by King. The Court, in turn, in not making the necessary distinctions also urged this same theory upon the jury by using general instructions. The Court being group minded always referred to the petitioner and his companion as "the defendants." It always inferred group possession as opposed to actual, physical and individual possession. Mental gymnastics are not involved when the petitioner contends that the problem here is one of common physical possession. Construction possession is not in point as shown by the lack of instructions given thereon by the trial judge. What was in the possession of Mr. Ringgold, was in the possession of Mr. Ringgold, not Mr. King. The petitioner did not have access to the pockets of Mr. King. Possession was exclusive as to Mr. Ringgold with regard to those items physically on his person. The

petitioner was possessed of but $1,015.00 [Government's exhibit No. 6] and not of the items in the pockets of Mr. Ringgold.

Therefore, the instruction given by the trial judge was defective in that it did not incorporate the necessary and vital distinction as to *actual* possession of recently stolen property.

CONCLUSION

For the reasons stated above, petitioner respectfully suggests that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

ORIE SELTZER
1415 K Street, N.W.
Washington, D.C.

THEODORE E. BREAULT
1415 K Street, N.W.
Washington, D.C.

APPENDIX A

Thereafter, on May 25, 1965, the following judgment was filed in this case.

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

September Term, 1964

No. 18,951
Bernard E. King, *Appellant*
v.
United States of America, *Appellee*

No. 18,959
William E. Ringgold, *Appellant*
v.
United States of America, *Appellee*

Appeals from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Senior Circuit Judge, and Washington and McGowan, Circuit Judges.

Judgment

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the judgments of the District Court appealed from in these cases are affirmed.

Dated: May 25, 1965 Per Curiam.

Filed: May 25, 1965 Nathan J. Paulson, CLERK

Thereafter, on October 5, 1965, Petition for rehearing en banc was denied.

Order

On consideration of appellants' petition for rehearing *en banc*, it is

ORDERED by the court *en banc* that appellants' aforesaid petition is denied.

Per Curiam.

Dated: Oct. 5, 1965

Before: Bazelon, Chief Judge, and Fahy, Washington, *Danaher, Burger, Wright, McGowan, Tamm,* and Leventhal, Circuit Judges, in Chambers.

Filed Oct. 5, 1965 Nathan J. Paulson, CLERK